FILED
FEB 24 1995
OFFICE OF THE CLERK

(3)

No. 94-1228

In The

Supreme Court of the United States

October Term, 1994

SANDRA SALAZAR,

Plaintiff, Petitioner,

v.

WHINK PRODUCTS CO., AN IOWA CORPORATION,

Defendant, Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION

DYER DONNELLY & LILLEY
F. JAMES DONNELLY #12243
825 Logan Street
Denver, CO 80203-3114
(303) 861-3003

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the limited preemption provision contained in the Federal Hazardous Substance Act, 15 U.S.C. §1261 *et seq.* bars petitioner's state common law tort claim.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Reasons for Granting the Writ 1

I. FHSA Does Not Preempt Sandra Salazar's Claim... 1

II. Even if *Cipollone* Completely Bars Salazar's Claim, a Mandate is Warranted 8

Conclusion 10

TABLE OF CITATIONS

Page

CASES CITED

Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S.Ct. 80 (1992) 8

Chemical Specialties Mfrs. Ass'n v. Clark, 482 F.2d 325 (5th Cir. 1973) 6

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) 1, 4, 5, 9

Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) 8

Matz v. Mile Hi Concrete, Inc., 819 P.2d 530 (Colo.App. 1991) 9

McCulloch v. State, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 579 (1819) 8

Moss v. Parks Corp., 985 F.2d 736 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2999, 125 L.Ed.2d 693 (1993) 1

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 1

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 2443 (1984) 1

Sorenson v. Sec'y of Treasury, 475 U.S. 851 (1986) 5

Sullivan v. Stroop, 496 U.S. 478 (1990) 5

United States Dep't of Treasury v. Fabe, 113 S.Ct. 2202 (1993) 5

TABLE OF CITATIONS – continued

Page

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) 1, 4

STATUTES CITED

15 U.S.C. §1261 ..... 2, 4

15 U.S.C. §1262 4

C.R.S. §13-21-403 8

OTHER AUTHORITIES CITED

16 C.F.R. §1500 *et seq.* 4

Lawrence H. Tribe, American Constitutional Law §6-25 at 479 8

Sutherland Statutory Construction §47.16, p. 161 (Sands 4th ed. 1984) 5

APPENDIX

Page

Appendix A – 15 U.S.C. §1261 (Historical Note) . . App. 1

Appendix B – Court Order dated August 4, 1992 . . App. 4

REASONS FOR GRANTING THE WRIT

I. FHSA DOES NOT PREEMPT SANDRA SALAZAR'S CLAIM

Whink argues that the Colorado Court of Appeals' decision in this matter denying Sandra Salazar's claim was merely a run-of-the-mill application of already well established law. This is not the case. While the Fourth Circuit in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993) *cert. denied* ___ U.S. ___, 113 S.Ct. 2999, 125 L.Ed.2d 693 (1993) is arguably inapposite to Salazar's position, *all* of the remaining authorities relied on by Whink involve statutes other than FHSA. These non-FHSA decisions are of questionable precedential value in light of *Cipollone's* instructions that when Congress considers preemption through a specific preemption clause, the issue becomes solely a question of statutory interpretation (*Cipollone, supra*, 112 S.Ct. 2618).

The Colorado Court of Appeals in its decision in this matter considered only a very abbreviated portion of FHSA's preemption provision (decision found original brief Appendix at page 8). A careful consideration of the entire FHSA preemption provision leads to a different conclusion, particularly in light of three bedrock principles applicable to any preemption analysis.

First, because of the importance of preserving our delicate state-federal balance, there is a strong presumption against preemption that may only be overcome by "clear and manifest" Congressional intent to oust state law. See *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2482, 2485 (1991).

Second, this presumption is even stronger where, as in this case, preemption would displace the historic power of the state to protect the health and safety of its citizenry. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, where a finding of preemption of common law claims would leave injured consumers without *any* state *or* federal remedy, as is the case here, a court may ascribe preemptive intent to Congress only in the most compelling circumstances. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

With the foregoing principles in mind, we now turn to the text of the FHSA preemption provision and analyze it in its entirety.

Preemption of state and local labeling requirements is addressed in Section 18(b) of the FHSA, 90 Stat. 510 (15 U.S.C. §1261 note). Section 18(b) provides in relevant part:

> (b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [of FHSA] designed to protect against a risk of illness or injury associated with the substance, no state or political subdivision of a state may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [of FHSA]. . . .
>
> (2) The Federal Government and the government of any state or political subdivision of a state may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the federal, state, or political subdivision requirement provides a higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1).
>
> (3)(A) Upon application of a state or political subdivision of a state, the Commission may, by regulation promulgated in accordance with subparagraph (B), exempt from paragraph (1), under such conditions as may be prescribed in such regulation,

any requirement of such state or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if –

(i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and

(ii) the state or political subdivision requirement

(I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and

(II) does not unduly burden interstate commerce.

In determining the burden, if any, of a state or political subdivision requirement of interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other states or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act for such substance (or its packaging). . . .

(4) Paragraph (1)(B) [concerning banned substances under FHSA] does not prohibit a state or a political subdivision of a state from establishing or continuing in effect a requirement which is designed to protect against a risk of illness or injury associated with fireworks devices or components thereof and which provides a higher degree of protection from such risk of illness or injury than a requirement in effect under a regulation of the Commission described in such paragraph.

Section 18(b)(1)(A) does *not* use or refer to the term "state law" in defining the bounds of its preemption. The language "state law" was critical to the analysis in *Cipollone* because "state law" may, of course, encompass common law. Rather, Section 18(b)(1)(A) provides that "no state or political subdivision of a state may establish or continue in effect a cautionary labeling requirement." It strains ordinary English usage well past the breaking point to say that a jury award to a tort plaintiff constitutes a "state or political subdivision of a state establish[ing] or continu[ing] in effect a . . . requirement." The illogic of Whink's argument is especially evident when measured against the strong presumption against preemption that animates the Supreme Court's Supremacy Clause jurisprudence. *See Mortier*, 111 S.Ct. at 2482, 2485. There is surely no "clear and manifest" language in Section 18(b) demonstrating Congress' intent to deprive individuals, such as Sandra Salazar, compensation for her losses. *Id.* at 2482.

Second, although the Colorado Court of Appeals relied heavily on the fact that both the statute in *Cipollone* and Section 18(b) FHSA use the term "requirement," (original brief) the question whether that term covers common law damage actions depends on its context in the operative statute. Section 18(b)(1)(A) uses the word "requirement" several times; the first time is to explain which federal requirements may have preemptive effect:

> if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [of the FHSA, 15 U.S.C. §§1261(p), 1262(b)] designed to protect against a risk of illness or injury associated with the substance. . . .

The use of the term "requirement" is a clear, unambiguous reference to the requirements for labels placed on containers of hazardous substances themselves. These label requirements are demanded by the federal government, either by statute or regulation. *See* 15 U.S.C. §§1261(p), 1262(b); 16 C.F.R. §§1500.14-15, 1500.82-83, 1500.121-125, 1500.128-134. It is evident, then, that this first use of the term "requirement" in Section 18(b) is *not* a reference to common law remedies.

And, given the strong presumption against preemption, the fact that Congress' primary reference to "requirement" in subsection (b)(1)(A) is only to statutes and regulations, counsels very heavily against a finding of preemption here.

Later in subsection (b)(1)(A), the term "requirement" is used again to refer to the actions of states and their political subdivisions that may be preempted by the FHSA. The term is stated identically to its first use, without any embellishment or reference to damage actions or the common law, and there is no reason to believe that Congress meant it to be interpreted differently the second time. Thus, acceptance of Whink's view of subsection (b)(1)(A) would subvert "[t]he normal rule of statutory construction [that] assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (internal quotations and case citations omitted). *See also, e.g., Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *United States Dep't of Treasury v. Fabe*, 113 S.Ct. 2202, 2215 (1993) (Scalia, J., dissenting) (referring to principle as "basic rule of statutory construction"); *Sutherland Statutory Construction* §47.16, p. 161 (Sands 4th ed. 1984) (multiple uses of same word ought to be accorded same meaning). In short, there can be no doubt that the "requirements" of state law are the same type of "requirements" of federal law referred to at the beginning of Section 18(b)(1)(A), *i.e.* statutes and regulations, not common law damage remedies.[1]

Third, the reference in subsection (b)(1)(A) to the requirements of a "state or *political subdivision of a state*" provides additional evidence that Congress had no intention to preempt state common law actions. Political subdivisions of states, such as counties and towns, often enact health and

---

[1] This factor further distinguishes Section 18(b) from the provision in *Cipollone*, where not only did the preemption language refer expansively to *all* "state law," but it mentioned the term "requirement" only once, referring *only* to state law, and making no mention of federal "requirements." *See Cipollone*, 112 S.Ct. at 2617 (quoting relevant preemption language, Section 5(b) of Public Health Cigarette Smoking Act of 1969).

safety laws, some of which regulate hazardous substances that come under the jurisdiction of the FHSA. *See Chemical Specialties Mfrs. Ass'n v. Clark*, 482 F.2d 325 (5th Cir. 1973); *cf. Mortier*, 111 S.Ct. at 2480-81 (local ordinance regulating pesticides analyzed under federal pesticide preemption provision). Thus, it made sense for Congress to include political subdivisions in the coverage of Section 18(b), lest there be some ambiguity as to the breadth of the term "state." However, political subdivisions do not generally establish courts of general jurisdiction that conduct jury trials in product liability cases; rather, as in Colorado, those courts are creatures of the state itself. Nor do political subdivisions maintain common law duties under which individuals can seek redress. Thus, Section 18(b)'s preemption of the actions of political subdivisions can only sensibly apply to the positive enactments of local governments. And, therefore, by using the integrated term "state or political subdivision of a state," whose legislative and regulatory bodies "establish or continue in effect" labeling requirements, Congress could not have meant Section 18(b) to preempt jury awards in tort cases. Put another way, this Court should not ascribe to Congress a broader preemptive intent concerning the actions of the states themselves than to their political subdivisions, without at least some indication that Congress had such an intent.

Fourth, Whink wholly ignores subsections (b)(2), (b)(3), and (b)(4) of Section 18, each of which provide further confirmation that Congress did not intend to preempt state common law actions. Subsection (b)(2) allows the federal and state governments to establish "requirements" for [their] own use" if those requirements "provide a higher degree of proteciton" than do the relevant FHSA labeling requirements. Once again, it is absolutely clear that the reference to "requirements" here is to the positive enactments of legislative and regulatory bodies, since federal and state governments obviously do not "establish and continue in effect" labeling requirements "for [their] own use" that consist of damage awards. Again, it would be inconsistent with the principle of statutory construction that multiple uses of the same word in the same statute ought to be accorded the same

meaning, to expand the term "requirement" to cover common law actions, while Congress clearly intended a more restrictive meaning of that term elsewhere in the statute.

Subsection (b)(3) further undermines the contention that Section 18(b) is applicable to common law claims. Subsection (b)(3) allows states or their political subdivisions to apply to the federal Consumer Product Safety Commission ("CPSC") for exemptions from preemption, so that they can maintain requirements that are otherwise preempted. Subsection (b)(3)'s language is parallel to that of subsection (b)(1)(A), *i.e.*, it permits exemption of *any* labeling requirement that may be preempted, but only upon applications of "states or political subdivision[s]." The obvious purpose of subsection (b)(3) is to allow state and local governments to seek exemptions for their laws and regulations, and it could not logically include tort actions, which depend on the particular facts of each case. Thus, to interpret subsection (b)(1)(A), upon which defendant relies, to include the preemption of common law claims, when subsection (b)(3) plainly does not, would suggest that Congress intended to inject an awkward and illogical asymmetry into Section 18(b).

Finally, subsection (b)(4) allows the states and their political subdivisions to establish or continue in effect requirements designed to protect their citizens from fireworks as long as those requirements are more protective than the standards established under the FHSA. A common sense reading of Section 18(b) indicates that these "requirements" are not common law actions, but the enactments of state and local governments. Once again, there is no reason to believe that Congress singled out state damage awards as "requirements" that could be preempted under subsection (b)(1)(A), when it did not do so anywhere else in the statute. Rather, as we have shown, Congress limited the preemptive reach of the FHSA to state and local enactments.

As the foregoing discussion indicates, the overall structure of Section 18(b) of FHSA makes it clear that Congress wanted to preempt only certain state and local enactments that require manufacturers to label their products in a particular manner. State tort law can, on occasion, send a signal to a

manufacturer that its label does not convey all the information necessary to protect a person from injury. However, its principal purpose is to compensate victims, and a verdict for a plaintiff would *not* require a manufacturer to label its product in any particular manner as do state laws and regulations. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). Thus, a tort award in this case would be consistent with the purpose of FHSA – to protect the public from hazardous substances. In the event Whink decided to relabel its product, such an action would not violate FHSA which requires that certain statements be made, but in no way prevents warnings as suggested by Salazar. *Accord, Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 950 (9th Cir.), *cert. denied*, 113 S.Ct. 80 (1992).

II. EVEN IF *CIPOLLONE* COMPLETELY BARS SALAZAR'S CLAIM, A MANDATE IS WARRANTED.

Whink repeatedly states in its brief that its compliance with FHSA was undisputed by Salazar. While the Colorado Court of Appeals made such a finding, the finding was in error. The record in this matter is devoid of one single reference wherein Salazar either expressly or impliedly admitted that Whink complied with FHSA. Salazar was simply silent on this issue because while her case was being litigated, compliance with FHSA was not a critical issue.

Whink argues that since *McCulloch v. State*, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 579 (1819), the doctrine of preemption has been in existence and Salazar therefore should have conducted discovery concerning Whink's compliance with FHSA (page 8 in Whink's brief). Such an argument ignores the evolving nature of the doctrine (*see* Lawrence H. Tribe, American Constitutional Law §6-25 at 479), or, for that matter, the evolving nature of the law itself. The argument also ignores a Colorado statute directly on point, C.R.S. 13-21-403, which makes compliance with federal regulations only a "rebuttable presumption" that the product was "not

defective" (Appendix A, original brief). At the time of the *Cipollone* decision, the statute had been applied as recently as March 1991. *Matz v. Mile Hi Concrete, Inc.*, 819 P.2d 530 (Colo.App. 1991) (later affirmed in part and reversed in part on unrelated grounds, 842 P.2d 198 (Colo. 1992)).

On January 7, 1992, Whink moved for summary judgment based on both preemption grounds and misuse of the product. The motions were fully briefed, of course, without reference to *Cipollone*, which had not been decided. *Cipollone* was decided while the motions were pending. On August 4, 1992, before *Cipollone* had even made the reporters, the court entered an order setting Whink's motion for summary judgment (R. p. 435, Appendix B). The court's order is brief, and bears quoting directly:

> The parties are directed to contact my division clerk, within 10 days of the date of this order, to set this matter for a one hour oral argument on Defendant's Motion for Summary Judgment. *That oral argument will be limited to the issue of the misuse defense.* (emphasis added)

As of August 4, 1992, prior to publication of the *Cipollone* decision, the court had reviewed Whink's arguments regarding preemption and, by implication, held them unimportant. It would have been folly for Salazar's counsel to then conduct discovery upon an issue that the trial court had already eliminated from the case.

Contrary to the assertions of Whink (p. 9 of their brief), Salazar did *not* lose Whink's Motion for Summary Judgment based upon preemption issues. Rather, the court decided the issue wrongfully on the misuse defense (Appendix 1A-14A of Respondent's Brief in Opposition). It was only on appeal, well after discovery had been terminated, that Sandra Salazar's claim was barred by preemption.

If the *Cipollone* case stands for the proposition that state common law claims for failure to warn are barred by FHSA, such a proposition is a significant change to the law of Colorado. This is a change which came to Sandra Salazar long after her complaint was filed, and after a point in the action in which her counsel could take steps necessary to evaluate and

act on the change. Sandra Salazar should, at least, be granted an opportunity to present evidence in her possession that Whink's label did not comply with FHSA.

CONCLUSION

For each of the reasons stated above, plaintiff Sandra Salazar hereby petitions this Court for a writ of certiorari reviewing the decisions of the Colorado Court of Appeals and the denial of certiorari by the Colorado Supreme Court.

Respectfully submitted this 23rd day of February, 1995.

DYER DONNELLY & LILLEY
F. JAMES DONNELLY #12243
825 Logan Street
Denver, CO 80203-3114
(303) 861-3003

APPENDIX A

15 U.S.C. §1261, HISTORICAL NOTE

(b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [of FHSA] designed to protect against a risk of illness or injury associated with the substance, no state or political subdivision of a state may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [of FHSA]. . . .

(2) The Federal Government and the government of any state or political subdivision of a state may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the federal, state, or political subdivision requirement provides a higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1).

(3)(A) Upon application of a state or political subdivision of a state, the Commission may, by regulation promulgated in accordance with

subparagraph (B), exempt from paragraph (1), under such conditions as may be prescribed in such regulation, any requirement of such state or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if –

> (i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and
>
> (ii) the state or political subdivision requirement
>
> (I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and
>
> (II) does not unduly burden interstate commerce.

In determining the burden, if any, of a state or political subdivision requirement of interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other states or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act for such substance (or its packaging). . . .

(4) Paragraph (1)(B) [concerning banned substances under FHSA] does not prohibit a state or a political subdivision of a state from establishing or continuing in effect a requirement which is designed to protect against a risk of illness or injury associated with fireworks devices or components thereof and which provides a higher degree of protection from such risk of illness or injury than a requirement in effect under a regulation of the Commission described in such paragraph.

(B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(g) [subsec. (g) of this section] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision or a state may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

15 U.S.C. §1261, Historical Note – Effect upon Federal and State Law – Pub.L. 86-613, §18, formerly 17, July 12, 1960, 74 Stat. 380, as amended Pub.L. 89-756, §4(a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub.L. 91-113, §4(a), (b)(1), Nov. 6, 1969, 83 Stat. 189, 190; Pub.L. 94-284, §17(a), May 11, 1976, 90 Stat. 510.

APPENDIX B

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90-CV-7830 Courtroom 21

ORDER

SANDRA SALAZAR,

Plaintiff,

v.

WHINK PRODUCTS CO., an Iowa corporation and MONTE VISTA ARAPAHOE, INC., dba MONTE VISTA SUPER FOODS, a Colorado Corporation, ROBERT W. SPLETTSTOESSER, M.D., and MONTE VISTA PROFESSIONAL ASSOCIATES,

Defendants.

The parties are directed to contact my division clerk, within 10 days of the date of this Order, to set this matter for a one hour oral argument on Defendants' Motion for Summary Judgment. That oral argument will be limited to the issue of the misuse defense.

Defendants are directed to tender a complete copy of the transcript of Plaintiff's Deposition five days before the argument.

Dated this 4th day of August, 1992.

BY THE COURT:

/s/ Morris B. Hoffman
Morris B. Hoffman
District Court Judge

cc: A. Walsh
J. Ronald Voss
L. Heintz
F. James Donnelly
P. Pearson